RENEGOTIATE OR TERMINATE
THE VISITING FORCES AGREEMENT

By Senator Miriam Defensor Santiago
Chair, Legislative Oversight Committee on the VFA
(Sponsorship speech on 16 September 2009)

Mr. President, distinguished colleagues:

On behalf of the Legislative Oversight Committee on the Visiting Forces Agreement (LOVFA), Senate panel, I have the honor to seek approval of Senate Resolution No. 1356, entitled "Resolution expressing the sense of the Senate that the Department of Foreign Affairs should seek to renegotiate the Visiting Forces Agreement with the United States, and in case of denial, should give notice of termination of the VFA."

Constitution Bans Foreign Military Presence

After the Marcos rule, the renewal of the country's constitutional regime prioritized the supreme concern of putting an end to foreign military presence, and an end to the continuity of US hegemony. Thus, the Constitution, Article 18, Section 25 provides in part: "Foreign military bases, troops, or facilities shall not be allowed in the Philippines, except under a treaty duly concurred in by the Senate, and . . . recognized as a treaty by the other contracting State."

This supreme concern to free the country's armed forces from the control of a foreign power intended to transform the AFP into a real backbone of Philippine sovereignty, instead of the hired spine of a foreign sovereign. The prospect of

realizing the program of AFP modernization generated considerable expectation of independence right in the AFP itself.

But the advent of the VFA spelled the restoration of the AFP dependence on America. Hence, the fate of modernization has ceased to be a politically appropriate topic in civilized circles.

2009 Supreme Court Case: Doctrinal Confusion

In the 2009 case of *Nicolas v. Romulo,* the Supreme Court held, by a split vote of 9-4, that the VFA is constitutional. The dissenters were led by no less than Chief Justice Puno, who began by saying: "This slur on our sovereignty cannot continue, especially if we are the ones perpetuating it."

As a student of constitutional law, I humbly submit that the *Nicolas* ruling suffers from doctrinal confusion, and that it will not stand the test of time. I pointed out earlier that the Philippine Constitution requires that foreign military bases, troops, or facilities shall not be allowed in the Philippines, except under a treaty **recognized as a treaty by the other contracting State.**

Has the US government recognized the VFA as a treaty? The answer is no.

The US Constitution provides that the US President has the power to make treaties, but only "by and with the advice and consent of the Senate, provided two-thirds of the Senators present concur."[1] Has the VFA been concurred in by two-thirds of the US Senate? The answer is no.

The *Nicolas* majority opinion claimed that the VFA was submitted to the US Senate. This is misleading. The VFA was submitted as a compliance with an American law called the Case-Zablocki Act. This Act requires the US President, through the Secretary of State, to transmit to the US Congress, the international agreements entered into by the US government, or by its officials or agencies, **which are not characterized as treaties**. Thus, the US government does not characterize the VFA as a treaty. Therefore, the VFA, since it does not comply with the requirement of the RP Constitution, is unconstitutional and void in our country.

But because of the *Nicolas* opinion, the VFA is now part of the law of the land, to use RP constitutional language. By contrast, since the VFA is not characterized as a treaty in the US, it is not the supreme law of the land, to use US constitutional language. The US does not consider the VFA as a treaty, and it certainly does not consider the VFA as a self-executing treaty. Thus, US courts are not necessarily bound by it, because the US government considers the VFA as a mere executive agreement.

VFA Void for Vagueness

In the language of constitutional law, the VFA is void for vagueness, because it fails to define the terms “visit”, “temporary”, and “military activities.” Under the vagueness doctrine, it is impermissible for a statute to delegate basic

policy matters to administrators, to such a degree as to lead to arbitrary and discriminatory application.

a. No Definition of "Visit"

Filipino political leaders involved in the signature and ratification of the Visiting Forces Agreement with the United States (VFA) appear to have limited themselves to the title of the VFA, and never bothered to explain the term "visit" in the text. They gave the impression that under the VFA, the US military forces would be just "visiting".

The document is officially titled: "Agreement between the government of the Republic of the Philippines and the government of the United States of America regarding the treatment of US armed forces **visiting** the Philippines." **But there is no definition of a visit**.

Before the VFA was signed by the two governments, President Ramos described the VFA as intended for military exercises of US and Philippine forces. Endorsing the VFA for Senate concurrence, President Estrada emphasized in his press statements that the VFA pertained only to "military exercises". Then Secretary of Foreign Affairs Siazon, who signed the VFA for the Philippines, expressed himself more clearly: "The VFA only speaks of American military forces who come to the country to conduct joint military exercises with Philippine troops."[2] Deliberate or not, these pronouncements, authoritative as they are, give a false or even deceptive impression of the VFA.

b. No Definition of "Temporary"

The VFA, Article 1 titled "Definitions" does not define what is "temporary." It merely states: "'US personnel' means US military and civilian personnel **temporarily** in the Philippines."

Black's Law Dictionary, 8th edition 2004, defines "visit" in international law as a naval officer's boarding of an ostensibly neutral merchant vessel from another state to exercise the right of search. The same law dictionary defines "temporary" as continuing for a limited (usually short) time.

The Oxford Dictionary of Law, 6th edition 2006, defines "visiting forces" as: "forces from abroad, including their civilian components." It does not bother to define "temporary."

In the absence of conventional dictionary definitions of the words "visit" and "temporary" as terms of international law, it becomes necessary to define these terms in any international agreement. When the VFA failed to define these terms, then the failure to do so was done willfully and in bad faith. These undefined terms are each a lacuna, a blank space. These lacunae in substantive information are purposely devious, in order to allow the US forces to stay indefinitely in our country.

Thus, built into the VFA is a mechanism of flexibility that can deploy the US military forces in Philippine territory in a broad spread of strategic purposes, making the VFA an omnibus of US military presence of various forms and of varying objectives.

The history of the Senate contains certain defining moments, and one of them was Senate rejection of a new proposed agreement for the retention of the US military bases. But that defining moment appears to have been blurred, if not erased, by the VFA, which restores US military presence in our country.

c. No Definition of "Activities"

The political leadership that has given a deceptive description of the VFA as designed only for "military exercises" will be put to shame by their own reading of the VFA text, which **NEVER** uses the term "military exercise". The Preamble merely states: "Reaffirming their obligations under the Mutual Defense Treaty of 30 August 1951." By contrast, the text of the VFA uses the term "activities," without defining it or setting its limits.

Although the "activities" of US military forces under the VFA are unbounded, not one office or agency of the Philippine government – including the Senate – has ever raised the fundamental issue as to the magnitude of US military presence that the VFA allows. Similarly, the unlimited "activities" that the Philippine government may approve under the VFA has not been publicly discussed. And yet, the determination of the true nature and extent of the VFA hinges on what "activities" are contemplated by its object and purpose.

The VFA, Article 1, makes mention of "activities approved by the Philippine Government," which may justify the presence of United States military and civilian personnel in the Philippines. Under Article 3 (1), the Philippine

Government is under duty to facilitate the admission of US personnel into the Philippines "in connection with activities covered by this agreement". What "activities" are subject to approval by the Philippine Government; and what are the "activities covered by this agreement" are questions that determine the nature, purpose, scope, and frequency of "visits" that actualize the US military presence.

The result is that the VFA, in circumvention of the prohibition against foreign military presence under the Constitution, opens the way to all forms of military activities of the US forces in Philippine territory, short of establishing a permanent military base.

Strategy of Forward Operating Bases

It must be emphasized that following the end of the Cold War with the implosion of the Soviet Union, the United States shifted its strategic policy from maintaining a permanent military base. It could be that changing power relations may require basing arrangements, in particular because of the emergence of an Enemy State, in sharpening conflict situations that may develop in US-China relations. But that is for the future.

For the present, the US policy is in favor of flexible military responses toward the development of "hybrid warfare" that calls for quick mobilization of small specially trained contingents, directed to specific incidents. This is also called "crisis response, rapid deployment unit".

These are part of the new American military strategy of fighting so-called asymmetrical wars. Under this new lexicon, US forces establish Cooperative Security Locations where they pre-position logistical support. The Americans keep these locations small to avoid detection, but are prepared to convert them into larger military bases, when it becomes necessary.

Under cover of the VFA, the US in effect operates these mobile and flexible forward operating bases. These bases are not limited to training and capacity building. They go further by allegedly providing "logistical and intelligence support." This term is so broad that under US interpretation, it allows actual immersion in combat operations.[3]

An American writer, in an article in the publication *Atlantic Monthly*, said:[4]

> There is high probability as well as existing accounts that the US forces are engaged in combat operations. The US Institute for Peace, a US government funded institution, describes the role of the US forces deployed in Mindanao in its February 2008 report. The deployment of US forces in Mindanao was not for humanitarian missions or civic actions, but for specific military objectives.

US Task Force Engages in Combat

Two categories of military activities under the VFA have been established:

- The regular joint military exercises, which require **temporary** stay of US forces for the duration of each joint exercise; and

- The Joint Special Operations Task Force Philippines (JSOTF-P), here known as Task Force. The Task Force is intended to target "terrorists", i.e. the Abu Sayyaf Group (ASG) and the Jemaah Islamiyah (JI), which are both listed by

the US Department of State as “foreign terrorist organizations”. By its nature, the Task Forces, such as the JSOTF-P, normally operate in war zones as US instruments in its “global war against terror”.

The first commander of the Task Force, Col. David Maxwell, has clearly implied that combat operations are part of its business. He wrote in a military review journal this jaw-dropping example of constitutional illiteracy: [5]

> The deployment of U.S. troops was contentious in-country, because the local press asserted that U.S. forces could not legally participate in combat operations. **However, a correct reading of the Philippine Constitution reveals that it prohibits only the stationing of foreign forces in the Philippines… The Constitution does not prohibit combat operations** and provides an exception to this if there is a treaty in force and a treaty has been in force between the two countries since 1951. (Emphasis added.)

Newspaper reports, internet sources, and US military accounts indicate that through the Task Force, US forces are engaged in unconventional warfare and combat operations. Col. Maxwell has described the Task Force that he once led as conducting operations “under the guise of an exercise”. [6] It is widely believed too, through US and Philippine sources, that US forces have established small-scale military bases in Zamboanga City and Sulu.

Detailed accounts of US military presence in the Philippines are too extensive to be treated in a short sponsorship speech. Accordingly, I am prepared with an Annex “A” that gives a sampling of the sources available, in particular from US military accounts.

Adding to the expansive meaning of the term "activities" as used in the VFA, US Defense Secretary William Cohen once declared that the VFA would enable US ships to have port calls or regular calls, aside from military training. In the period April 2001 to October 2007, more than 50 US warships entered Philippine territory and docked in various parts of the Philippine archipelago.[7]

Mutual Defense Treaty Irrelevant

Since this Senate failed to raise the fundamental issue as to the scope or magnitude of US military forces under the VFA, what "activities" have been performed in practice in the course of the VFA implementation?

By decision of the Mutual Defense Board, the US-RP Mutual Defense Treaty (MDT) has been retooled into an anti-terrorism instrument, presumably on the basis of agreement between President Bush and President Arroyo. Quite remote from the object and purpose of the MDT, anti-terrorist activities have assumed a formal vehicle in MDT.

This gives the impression that the anti-terrorism measures by US military forces in Philippine territory are being carried out as a matter of treaty obligation on the part Philippine government. Thus, there would be no need of a separate agreement on combating international terrorism, and consequently there would be no need of Senate approval through constitutional concurrence. It is under the US policy against terrorism that the US-RP joint military exercises have been conducted through the years, such as the Balikatan exercises.

It is routinely argued that the 1998 VFA merely implements the 1951 Mutual Defense Treaty. These two instruments are 50 years apart. How could the RP and the US provide in 1951 for the problem of terrorism in 1998? And if this agreement is to be taken seriously, why is there no mention of the Mutual Defense Treaty in the text of the VFA? The MDT is only mentioned in the Preamble.

The Philippine Supreme Court considers that the preamble is not an essential part of a statute: "The preamble can neither expand nor restrict its operation, much less prevail over its text. Nor can a preamble be used as basis for giving a statute a meaning not apparent on its face."[8]

In any event, the MDT merely declares in Article 4: "Each party recognizes that an **armed attack** in the Pacific area or either of the parties would be dangerous to its own peace and safety, and declares that it would act to meet the common dangers **in accordance with its constitutional processes**."

Thus, the MDT is irrelevant to the VFA. There is no armed attack against the Philippines; what we have in Mindanao is an insurgency. In case of armed attack in the Philippines, US response would not be automatic, but would have to undergo US constitutional processes, whatever the Americans will conceive it to be.

If China launches an armed attack against the Philippines over ownership claims to the Spratleys, will the US come to the aid of the Philippines? No. During this year's visit to the Philippines, US Defense Secretary Robert Gates was quoted as saying: "There are a number of security challenges and obvious

concerns on conflicting claims in the South China Sea. **The US takes no position on these claims."**[9]

But in *realpolitik*, Gates was merely saying that the US at this time cannot afford to antagonize the US. China has bought US treasury bonds worth US$1 trillion. These so-called treasuries are documents of loans borrowed by the US. Hence, the US owes US$1 trillion to China.

Benefits Are Illusory

The Philippines is not even among the Top Ten Military Aid Recipients of the US compiled by the Center for Public Integrity three years after the 9-11 bombings of the Twin Towers in New York.[10] The following list uses round figures:

1. Israel	-	$ 9 B
2. Egypt	-	$ 6 B
3. Pakistan	-	$ 4.6 B
4. Jordan	-	$ 2.6 B
5. Afghanistan	-	$ 2.6 B
6. Colombia	-	$ 2 B
7. Turkey	-	$ 1 B
8. Peru	-	$445.8 M
9. Bolivia	-	$320.6 M
10. Poland	-	$313 M

From Malacañang, the VFA Commission has produced the following list of financial aid from the US, as follows:

Foreign Military Financing since 1999	-	US$250 M
Foreign Military Sales 2001-07	-	76.5 M
Excess Defense Articles 1999-2007	-	76.7 M

The US calls the Philippines as a major non-NATO ally, but treats us like a shabby country cousin. In return for the VFA, what we receive is paltry, mostly in the form of Excess Defense Articles, in other words, US military junk. According to the Federation of American Scientists: "Not wanting to pay the cost of things or destroying the surplus, the US Department of Defense dispenses most of it for free, or at deep reduction through the excess defense articles (EDA) program."

It is said that despite years of American military aid to the Philippines, the AFP remains the most poorly equipped in Asia. *Paano, akala natin bibigyan tayo ng Amerikano ng pampagara, yon pala, ukay-ukay ang inabot natin!*

Conclusion

This Senate should at best express the desire of the thinking Filipino to renegotiate or else terminate the VFA, for the following reasons:

1. It violates the Philippine Constitution, which provides that the US as the other contracting state should have recognized the VFA as a treaty, not as a mere executive agreement.

2. The VFA, to use a constitutional law term, is void for vagueness, in that it fails to define the crucial terms "visit", "temporary," and "activities."

3. The Supreme Court opinion in the 2009 case of *Nicolas v. Romulo* suffers from doctrinal confusion.

4. American military forces constitute so-called forward operating bases.

5. Only the preamble, not the text, of the VFA mentions the ancient Mutual Defense Treaty, which does not even provide for automatic US help in case of actual attack on the Philippines.

6. The alleged financial benefits under VFA for the most part constitute US military junk.

7. The VFA is a failure, because after 10 years, the AFP has not modernized sufficiently to keep up with our Asian neighbors, and the terrorist groups are still active.

To top it all, on 21 August 2009, the *New York Times* reported: "Defense Sec. Robert M. Gates has decided to keep an elite 600-troop counterinsurgency operation deployed in the Philippines." Ladies and gentlemen of the Senate, this unilateral statement, issued with the usual American military hubris, without consultation and without the consent of the proper Philippine authorities, is no less than an act of provocation against our sovereign country. Please, President Obama, say it's not true.

And please, ladies and gentlemen of the Senate, do not continue to look the other way, because history is looking us straight in the face. We have tried the VFA for ten years and found it wanting. It is not for this Senate to determine the life expectancy of the VFA. That power belongs to the Philippine President. Therefore, at the very least, this Senate should ask the executive branch of government either to renegotiate or to terminate the VFA.

For, as the immortal Justice Holmes said: “It must be remembered that in quite as great a degree as the courts, legislatures are the ultimate guardian of the liberties and welfare of the people.”

-End-

FOOTNOTES

[1] US Constitution, Art. 2, Sec. 2.

[2] With sources from M. M. Magallona, *Legal Issues in the RP-US Visiting Forces Agreement,* U.P. Law Center, 1998, p.1.

[3] John Hendren, "Rebels shoot at US Troops in the Philippines," *Los Angeles Times*, 18 June 2002.

[4] Robert D. Kaplan, "Imperial Grunts," *Atlantic Monthly*, October 2008, available online.

[5] *Military Review Journal*, May-June 2004, as quoted in *Focus on the Global South*, Unconventional Warfare, No. 1 January 2007, pp. 8-10.

[6] *Focus on the Global South*, At the Door of All the East, No. 2, November 2002, pp. 60-61.

[7] *International Herald Tribune*, 4 August 1998.

[8] *People v. Garcia*, 85 Phil. 663 (1950).

[9] Ellen Tordesillas, June 2009 online.

[10] Center for Philippine Integrity, "Collateral Danger: Human Rights and US Military Aid After 9/11," issued 22 May 2007 online.